Supreme Court, U. S.
FILED
APR 4 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1590

JOSEPH NOLAN, The Younger

Petitioner

vs.

STATE OF MARYLAND

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Harold I. Glaser
1504 Arlington Fed. Bldg.
Baltimore, Maryland 21201

Richard M. Karceski
1504 Arlington Fed. Bldg.
Baltimore, Maryland 21201

Attorneys for the Petitioner

IN THE

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OCTOBER TERM, 1979

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

Harold I. Glaser
1504 Arlington Fed. Bldg.
Baltimore, Maryland 21201

Richard M. Karceski
1504 Arlington Fed. Bldg.
Baltimore, Maryland 21201

Attorneys for the Petitioner

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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Joseph Nolan, the Younger, prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Special Appeals of Maryland filed in the above entitled case on October 31, 1979; the mandate of the Court of Special Appeals of Maryland filed on November 30, 1979 and the Order of the Court of Appeals of Maryland filed on January 4, 1980.

OPINION BELOW

The opinion of the Court of Special Appeals of Maryland is an unreported opinion which appears in Appendix A to this Petition.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland was filed on October 31, 1979. The Order of the Court of Appeals of Maryland was filed on January 4, 1980. The jurisdiction of this Court is invoked under 28 U.S.C.

QUESTION PRESENTED

Did the Appellate Court err in failing to reach and decide the following issue:

"Did the trial court err in admitting in evidence an unsigned letter as it was either hearsay testimony or there was insufficient foundation to connect the letter with the Petitioner."

CONSTITUTIONAL PROVISIONS INVOLVED

This case and the issue presented involves the Sixth Amendment to the Constitution of the United States which provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." (emph. added)

STATEMENT OF THE CASE

The Petitioner, Joseph Nolan, the Younger, also known as Junie Nolan, was charged in Indictment numbered 57813213, 57813215 and 57813217,by the Grand Jury of the State of Maryland sitting in Baltimore City,with homicide, kidnapping and extortion.

Following a denial of a motion for change of venure, Petitioner was tried in the Criminal Court of Baltimore City, the Honorable Joseph H.H. Kaplan presiding with a jury. n December 14, 1978, the jury returned verdicts of first degree felony murder, kidnapping and extortion.

On January 23,1979, Petitioner, Joseph Nolan, the Younger, was sentenced for this conviction. Petitioner was committed to the custody of the Department of Corrections to life imprisonment for the felony murder with a consecutive ten year sentence for extortion (the kidnapping charge having been merged).

It is from this conviction and sentence that Petitioner noted his Appeal to the Court of Special Appeals of Maryland and the Petition for Certiorari to the Court of Appeals of Maryland. His conviction having been affirmed, it is from that decision that Petitioner notes his timely request to this Honorable Court.

STATEMENT OF FACTS

Between 6:30 and 7:00 p.m. on May 1, 1978, Mrs. Betty Godfrey received a telephone call from an individual she identified as

Appellant, saying he had her son, Tony Howe, and she would have to pay $300.00 to get him back. Although she was not too upset and did not believe that her son was harmed, she called the police. Officer Grover Yox, of the Northwestern District, received the report and responded to Mrs. Godfrey's telephone call, and directed him to Appellant's home, 3416 Royce Avenue. Officer Yox then went to Appellant's home, where he was met by Officer David Gobin.

In the basement of Appellant's home, the officers found Appellant, Michael Evans, (who was convicted on similar charges in a separate trial) and Calvin Washington. After inquiring of the boys if they had seen Tony Howe, and getting a negative response, the officers returned to Mrs. Godfrey's house, taking the three boys with them.

By the time they returned, a group of people had assembled at Godfrey's, including Tony's six year old sister, Angeline. Angeline told the officers she had seen Appellant and Michael Evans with Tony earlier in the day, and based on this information, Officer Yox took Appellant and Michael Evans into custody.

Due to what Officer Yox perceived as a volatile situation, he took Appellant, Evans and Washington from Royce Avenue to Northwestern District. At approximately 7:50 p.m. Detective Coleman of Homicide was called into the case and reported to Northwestern District. Shortly thereafter, Detectives Donald Kincaid and George Christian also reported to Northwestern District.

From the time Appellant was brought to Northwestern, he was questioned about the whereabouts of Tony Howe by both police

officers and his parents. Appellant was at times allowed to be alone with his parents, and during these times, they pleaded with him to tell them if he knew where Tony was.

Until approximately 9:15 p.m., Appellant stated that he had no knowledge of where Tony was. At this point, Detectives Coleman, Christian and Kincaid were in the room with Appellant and his parents, and Detective Kincaid advised Appellant of his rights. Kincaid then left the room.

At approximately 9:45 p.m., while Officers Coleman and Christian, Appellant and his parents were in the room, Appellant jumped up and said "I will show you where he is". Thereafter, Officers Coleman and Christian, Mrs. Nolan and Appellant left the station and entered a police vehicle. Appellant directed the officers to the city dump on Cold Spring Lane, and, once they were in the dump, to a quarry located on that property. When they arrived at the quarry, Appellant indicated that he had last seen Tony on the rocks in the quarry.

Subsequent to Appellant's statement, Appellant, Mrs. Nolan and several officers went to the homicide office while Detective Coleman remained at the quarry to search for Tony. The search had to be suspended until the following day, due to lack of lighting. During the suspension in the search of the quarry, a search warrant for Michael Evans' home was obtained, based upon statements taken from Evans and Calvin Washington, which referred to items of Tony Howe's clothing which would be found there. At approximately 5:30 a.m. on May 2, the warrant was served and a tennis shoe and shirt, which were stipulated as belonging to Tony Howe, were found.

At approximately 5:45 a.m. on May 2, the search of the quarry was resumed, and based on slide marks in the area in which Appellant had said he last saw Tony, skin divers were instructed to search the water of the quarry. The divers discovered the body of a boy who was later identified as Tony Howe.

Sharon Hurtt, Appellant's girlfriend and Tony Howe's sister, testified that she was with Appellant and Michael Evans on April 30, 1978, although she had been forbidden by her step-father to see Appellant anymore. She stated that on that day Appellant told her they were going to kidnap Tony. She also testified that she met Michael Evans and Appellant on the morning of May 1, and spent the day with them at the quarry in the dump, returning home at approximately 2:45 p.m.

Later that afternoon at approximately 4:00 p.m., when she was at her cousin Yvette Shorter's house, Sharon testified that she received a telephone call from Appellant in which he stated that we killed your brother. Yvette and her sister Sandy, who was also present, took turns on the telephone and heard the same statement, although none of the three girls believed it. Shortly thereafter, Sharon returned home. Although her mother was upset and told her that Tony had been kidnapped, and police officers were present, Sharon said nothing to the police about the telephone conversation until early the next day. Neither Yvette nor Sandy rereported their conversations until much later.

Appellant testified on his own behalf that although he was present when Tony was pushed into the quarry and eventually drowned, he did not participate in the act. He also

denied making the telephone calls to Sharon and to Mrs. Godfrey.

During the State's cross-examination of Appellant, he was presented with, and questioned about a letter[1] received by Sharon Hurtt in August of 1978. Over defense objection, and following a line of questioning which implied that Appellant had either written the letter or caused a third person to do so, it was read to the jury by Appellant and admitted into evidence.

It is from this conviction and sentence that Petitioner noted his appeal to the Court of Special Appeals of Maryland and the Petition for Certiorari to the Court of Appeals of Maryland. His conviction having been affirmed, it is from that decision that Petitioner notes his timely request to this Honorable Court.

---

1. The letter read as follows:

Dear Sharon, how are you doing? Fine I hope. This is a good letter. I called your cousin's house looking for you. Right now I am not going to put my name but take a guess who it is. You should know. Well, I am doing fine. Tell your stepfather I said fuck him. My friend Jun want you back, so write him at this address. 401 E. Eager Street, Baltimore, Maryland 21202. Name, sorry. Can't give you the name but take a guess. Section G, Bed 52. It used to be your boyfriend's.

At the bottom of the letter was written Sandy Shorter's telephone number.

REASON FOR GRANTING THE WRIT

I. The Court of Special Appeals of Maryland erred in failing to reach and decide the following issue:

Did the trial court err in admitting an unsigned letter as it was either hearsay testimony or there was insufficient foundation to connect the letter with the Appellant/Petitioner.

The issue raised in this particular argument is one of first impression in the State of Maryland. This issue certainly should not be "sidestepped" by an Appellate Court abrogating the duty the Court owes to the administration of justice and the continued building of Maryland law through "Stare Decises".

In its "per curiam" opinion, Nolan vs. State (No. 171) the Court of Special Appeals held in the last sentence on this issue at page 6: "In our view, even if the admission of the letter was error - a point we do not decide - it was harmless."

The Attorney General in its brief below attempted to intimate such point was harmless error (appellee's brief p. 8). However, at the time of the argument before the Court of Special Appeals, October 19, 1979, Stephen B. Caplis, Assistant Attorney General, readily stated the State was withdrawing the allegation of harmless error and admitted such, if error, was indeed harmful. (emp. added)

In fact, in answer to Judge Mason's questioning, Mr. Caplis further stated in withdrawing the question of harmless error, that the importance of the letter as evidence was strongly argued in 'closing' by the

Prosecutor to the jury in requesting the finding of a guilty verdict. (emp. added)

Counsel for the Petitioner had requested prior to the filing of this Petition to have a complete transcript prepared of the argument including the Court's comments and questioning in order to append it as an exhibit to this Petition. However, counsel was informed no record was made of those proceedings.

The letter was unsigned and contained little to indicate who had written it. The State made no attempt to establish a connection between Appellant and the letter by testimony of hand-writing experts or even by merely comparing it w th other samples of Appellant's handwriting. Nor did the State attempt to establish who had written it if Appellant had not. In this instance, evidence was admitted with not only an inadequate foundation, but with no foundation whatsoever.

Although it is impossible to determine with certainty who wrote this unsigned letter, either alternative presents evidentiary problems. An obvious reference from the repeated references to Appellant in the third person would be that someone other than Appellant wrote it. In this case, the letter would be hearsay testimony. Black v. First National Bank, 96 Md. 399, 54 A. 88 (1903); Dimmick v. Hendley, 117 Md. 458, 84 A. 171 (1912); Singewald vs. Singewald, 165 Md. 136, 166 A. 441 (1933); Parr Construction Co. v. Pomer, 217 Md. 539, 133 A. 2d 69 (1958); see also Kapilof v. Locke, 276 Md. 466, 348 A. 2d. 397 (1975). The mere fact that it is a writing does not change its character as hearsay, or cause it to fall within an exception to the hearsay rule. Kapiloff v. Locke, supra.; Heil v. Zahn, 187

Md. 603, 51 A 2d 174 (1947). Indeed, the form of this testimony demonstrates clearly the hazards of hearsay testimony. The declarent was obviously unavailable for cross-examination, as no one knew who it was. Similarly, Appellant was deprived of the basic right to confront an adverse witness. The Court of Appeals had held that in the absence of a person who has allegedly produced a letter, for purposes of cross-examination, the proper foundation has not been laid, and the letter is inadmissable. Burton Builders Inc. v. L. & S. Construction, Co., 260 Md. 66, 271 A. 2d 534 (1970). This is clearly the situation if the letter is viewed as the writing of a third person. [2]

The fact that this hearsay testimony was in writing creates an additional problem. This may have imbued it with additional emphasis in the minds of the jury, and imparted an aura of credibility which was entirely unwarranted.

Assuming, arguendo, that the letter was written by Appellant, which was certainly one inference which the State would have the jury draw, the impropriety of its admission is equally as clear. No foundation was laid connecting Appellant with the letter. Both

2. Maryland courts have held that third party letters wirh far more persuasive identification than the letter in issue are "...unauthorized, unsworn hearsay testimony ...", Smith v. Jones, 236 Md. 305, 312, 203 A. 2d 865 (1963), see also Kapilof v. Locke, supra.

the courts and the legislature have recognized that a disputed writing should be authenticated, and that the testimony of qualified hand-writing experts, testimony of a person familiar with the challenged handwriting, or a comparison of handwriting samples by the trier of fact are appropriate means of authentication. Parker v. State, 12 Md. App. 611, 280 A 2d. 29 (1971); DiPietro v. State, 31 Md. App. 392, 356 A 2d. 599 (1976); Md. Code Ann. Cts. & Jud. Proc. Act, §10-906 (1974). The letter in this case was not accompanied by any competent proof by which the jury could infer that it was authentic and written by Appellant, and should not have been admitted. See Di-Giorgio Importing & S.S. Co. vs. Penn R. R. Co., 104 Md. 693, 65A 425 (1906).[3]

The contents of the letter reflected animosity toward Sharon Hurtt's stepfather. They also revealed a continuing interest in a relationship with Sharon Hurtt. As the State had been putting forth both these facts as a motive for Appellant's alleged role in the death of Tony Howe, Appellant was prejudiced by the jury's consideration of the letter, and its improper admission was reversible error.

---

3. The trial court evidently admitted the letter for its weight.

Q. You claim you didn't write that letter?

A. I didn't write it.

Q. Would you read that letter please?

Mr. Kaplan: Objection, Your Honor.

Mr. Sachs: For its weight, Your Honor.

The Court: The objection is overruled. The weight of this type of evidence is for the trier of fact only if properly admitted. Director v. Daniels, (continued)

The Fourth Amendment of the Constitution of the United States specifically provides that an accused has an absolute right of confrontation with the witnesses used against him. In this instance, the admission of the letter(without proper foundation) seriously impinged on that right.

---

3. (cont'd) 243, Md. 16, 211 A. 2d. 397 (1966). The letter was not properly admitted and should not have been considered by the jury.

CONCLUSION

In concluding, Petitioner herein respectfully requests that this Honorable Court grant his requested Writ of Certiorari for the reasons contained herein.

Respectfully submitted,

Harold I. Glaser

Richard M. Karceski

CERTIFICATE OF MAILING

I Hereby certify that on this _____ day of _____, 1980 3 copies of the aforegoing Petition for Writ of Certiorari was mailed to the Office of the Solicitor General of the United States, Room 5614, Department of Justice, Washington, D.C. 20530.

_____

HAROLD I. GLASER

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

September Term, 1979

No. 171

JOSEPH NOLAN, the younger

v.

STATE OF MARYLAND

Mason
Couch
MacDaniel,
JJ.

PER CURIAM

Filed: October 31, 1979

Following his conviction and sentencing for felony murder, kidnapping, and extortion, in a jury trial in the Criminal Court of Baltimore, Joseph Nolan, Jr. appeals, raising these questions:

> "1. Did the trial court err in admitting the hearsay testimony of Calvin Washington concerning statements made by Michael Evans in the absence of sufficient independent evidence to establish a conspiracy between Evans and Appellant?
>
> 2. Did the trial court err in admitting an unsigned letter which was either hearsay testimony or unsupported by a sufficient foundation connecting it to Appellant?
>
> 3. Did the trial court abuse its discretion in qualifying a six year old witness who had no conception that it is necessary to tell the truth in court and did not believe it is wrong to tell a lie?
>
> 4. Did the trial court err in denying the motion to withdraw brought by Michael Kaplan at the request of his client, Helen Nolan?"

Finding no error, we shall affirm.

The factual background leading to appellant's convictions will be stated briefly, with further facts supplied as necessary to discuss the various issues. On May 1, 1978, Mrs. Godfrey received a telephone call from an individual, whom she identified as appellant, in which she was advised that the caller had her son, Tony Howe, and that she would have to pay $300.00 to get him back. This call prompted Mrs. Godfrey to call the police, who responded to her home where she told them where appellant lived. At appellant's home the police found appellant, Michael Evans, and Calvin Washington. They were asked if they had seen Tony Howe, to which there was a negative response. Thereafter, the police, the appellant, and his two companions returned to Mrs. Godfrey's home where Tony's young sister, Angilene, told the officers that she had seen Tony with appellant and Evans earlier in

the day. Based on this information, appellant and Evans were taken into custody and transported to Northwestern District where appellant was questioned, with his parents in attendance at all times. During this questioning appellant ultimately stated, "I will show you where he is." Appellant then directed the police to the city dump on Cold Spring Lane and to a quarry located in the dump. Appellant showed the police where he had last seen Tony on the rocks in the quarry. Appellant was then taken to the Homicide Office, while other officers began a search of the quarry for Tony; this search was subsequently suspended due to darkness. Meanwhile a search, upon a warrant, was made of the Evans home and a tennis shoe and shirt, stipulated as belonging to Tony, were found. Early the next morning the search of the quarry was resumed, which ultimately resulted in the discovery of the body of Tony Howe. Appellant, testifying in his own behalf at trial, stated that although he was present when Tony was pushed into the quarry, he did not participate in the act. He also denied making the phone call to Mrs. Godfrey.

A. Did the trial court err in denying a motion to withdraw filed by appellant's attorney?

Appellant's attorney, Michael Kaplan, was retained to represent him by Nolan's mother since appellant was only fourteen years old. About six weeks before trial the attorney filed a motion to withdraw as appellant's counsel, at the request of appellant's mother. A hearing was held during which it was developed that the reason for the mother's request was that she felt there had been a breakdown in communications between her son and Mr. Kaplan. It became apparent, however, that this breakdown, if there was such in existence, was

due solely to appellant's feeling that Mr. Kaplan did not appear at the jail to see appellant at a time when the attorney said he would be there. Appellant advised the court that he had no other problems with the attorney. The State did not oppose the motion but made it clear that it wanted the trial to go forward on the assigned date. Mr. Kaplan advised the court he had no difficulties with continuing to represent appellant. The trial court denied the motion.

In Wright v. State, 32 Md. App. 60, 359 A.2d 1 (1976), we stated:

> "It is fundamental that in the absence of a specific and substantial reason for substitution of counsel, the question of whether to permit a change of counsel is a matter committed to the sound discretion of the trial court." [Citations omitted.]

Id. at 62. In our view, no abuse of discretion can be found in the denial of the motion by the trial court. There was no complaint by appellant or his mother that Mr. Kaplan was not representing him, nor could not represent him, adequately. Appellant's only complaint was that Mr. Kaplan did not keep some appointments or arrived late. We believe the proper administration of justice should not be impaired for frivolous reasons. While it appears the trial of the case may not have been delayed for an undue length of time, this, of course, is conjecture. Under the circumstances, we do not believe the trial judge abused his discretion.

B. Did the trial court err in admitting hearsay testimony of a co-conspirator in absence of sufficient independent evidence of a conspiracy?

During its case-in-chief, the State called Calvin Washington as a witness through whom it was shown that he visited Michael Evans on May 1, 1978 and, over appellant's objection, he related a conversation

ne had with Evans in which he said Evans told him, "Me and Junie killed Sharon's little brother." (Junie was appellant's nickname.) Washington was also shown a tennis shoe and shirt in Evans' backyard and was told they belonged to the little boy and that they were going to give them to the boy's mother for money. Appellant argues, and the State concurs, that this constituted hearsay; they part company at this point, however. The State argues that since it had established the existence of a conspiracy by independent evidence, these statements fell within the co-conspirator exception to the hearsay rule. In Mason, Taylor, and Taylor v. State, 18 Md. App. 130, 305 A.2d 492 (1973), cert. denied, 269 Md. 763, 767, cert. denied, 416 U.S. 907, we said:

> "... the rule is that when the State seeks to use statements against a co-conspirator made by another co-conspirator to a third party, it must first demonstrate, through evidence aliunde, the existence of a conspiracy, ..."

Id. at 136-37. Our independent review persuades us that the State had met its burden of establishing the existence of a conspiracy. There was testimony earlier in the trial that on the day before the incident appellant and Evans told Tony's sister they were going to kidnap a member of her family and that on May 1 appellant and Evans asked the sister for the whereabouts of Tony. The sister also testified that near dinnertime on May 1 appellant called her on the telephone and admitted he and Evans had killed Tony. Furthermore, Mrs. Godfrey had testified that appellant called on May 1 and demanded $300.00 for Tony's return. Finally, Tony's clothes were discovered at Evans' home. We believe this evidence sufficient to independently establish a conspiracy to murder, kidnap, and extort on the part of

appellant and Evans.

Appellant argues alternatively that the conspiracy had terminated (assuming it existed) since Evans made the statement to Washington after Tony was kidnapped and killed and thus the statement was inadmissible. We disagree with appellant since the extortion was ongoing; therefore, it is clear the entire conspiracy had not terminated when the statement was made. In Greenwald v. State, 221 Md. 245, 157 A.2d 119 (1960), appeal dismissed, 363 U.S. 721, the Court of Appeals stated:

> "... if the conspiracy contemplated the continuous cooperation of the conspirators in the perpetration of a series of offenses ... it was in effect 'a partnership in criminal purposes,' and continued until the time of its abandonment or the final accomplishment of its purposes."

Id. at 250-51. We find no error here.

C. Did the trial court err in admitting into evidence an unsigned letter?

In the course of the cross examination of appellant he was shown an unsigned letter,[1] which was addressed to Sharon, the victim's sister. The State's Attorney attempted to demonstrate that appellant had authored the letter, but he denied it. Although timely objection was made, the witness was allowed to read the letter to the jury and it was subsequently offered and admitted into evidence. Appellant

---

1. "Dear Sharon, how are you doing? Fine I hope. This is a good letter. I called your cousin's house looking for you. Right now I am not going to put my name but take a guess who it is. You should know. Well, I am doing fine. Tell your stepfather I said fuck him. My friend Jun want you back, so write him at this address. 401 E. Eager Street, Baltimore, Maryland, 21202. Name, sorry. Can't give you the name but take a guess. Section C, Bed 52. It used to be your boyfriend's."

argues that since the letter was unauthenticated and unsigned, it was inadmissible since it amounted to unsworn hearsay testimony, citing Parker v. State, 12 Md. App. 611, 280 A.2d 29 (1971) and DiPietro v. State, 31 Md. App. 392, 356 A.2d 599 (1976). The State contends the letter was authenticated by its contents, i.e., that the letter must have been written by appellant since it contained information that only appellant would know, citing McCormick on Evidence, 2nd Ed., Sec. 225, p. 552 (1972). We need not address the question of whether an unsigned writing may be authenticated by the alternate route of authentication of contents because we believe the admission of the letter to be merely cumulative in any event. Cf. Dorsey v. State, 276 Md. 638, 652-53, 350 A.2d 665 (1976). A reading of the letter demonstrates that the author was expressing animosity to Sharon's stepfather, a fact which easily could have been gleaned from previous testimony that the stepfather had forbidden Sharon from seeing appellant anymore. Further, the letter indicated that "Jun" wanted her back, certainly not evidence indicating complicity in the pending charges. In our view, even if the admission of the letter was error - a point we do not decide - it was harmless.

D. Did the trial court err in qualifying a six year old witness?

Angelina Howe, six years old and a sister of the victim, was offered as a witness by the State. Prior to being sworn, the State asked her a series of questions, obviously designed to determine whether the witness knew the difference between telling a lie and telling the truth, as well as knowing the consequences of telling a lie. Appellant contends that because of certain responses made by the witness she exhibited a questionable comprehension of the need for testifying truthfully. Appellant concedes that the capacity of

children to testify is within the sound discretion of the trial court. See Reckard v. State, 2 Md. App. 312, 234 A.2d 630 (1967), cert. denied, 248 Md. 734 (1968). Nevertheless, appellant contends this discretion was abused because there was no showing the witness demonstrated that she appreciated the obligation of an oath; indeed, she was not even asked. We have reviewed the record and while the witness did not know what would happen if she told a lie in court, she clearly exhibited an understanding of the difference between a lie and the truth, and the consequences of telling a lie, i.e., she would be punished. Furthermore, she promised to tell the truth in her testimony. It is evident that the trial judge found, and we cannot say he was wrong, that the witness understood the difference between telling the truth and telling a lie. We find no abuse of discretion in the judge's finding that she was competent to testify. See Williams v. State, 11 Md. App. 350, 274 A.2d 403 (1971).

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

MANDATE

Court of Special Appeals of Maryland

No. 171 , September Term, 19 79

JOSEPH NOLAN, THE YOUNGER	October 31, 1979 - Per Curiam filed. Judgments affirmed. Costs to be paid by appellant.
VS.	
STATE OF MARYLAND	November 30, 1979 - Mandate issued.

STATEMENT OF COSTS:

In ~~Circuit Court~~ Criminal Court of Baltimore

Record	30.00
Stenographer's Costs	1,374.00

In Court of Special Appeals:

Filing Record on Appeal	30.00
Printing Brief for Appellant	NOT SUPPLIED
Reply Brief	
Portion of Record Extract — Appellant	
Printing Brief for Cross-Appellee	
Printing Brief for Appellee	40.00
Portion of Record Extract — Appellee	
Printing Brief for Cross-Appellant	

STATE OF MARYLAND, Set:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the s Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affix the seal of the Court of Special Appeals, this thirtieth d of November, A.D. 19 79

Clerk of the Court of Special Appeals of Maryla

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE

JOSEPH NOLAN, the Younger	In the Court of Appeals of Maryland
v.	Petition Docket No. 374 September Term, 1979
STATE OF MARYLAND	(No. 171, September Term, 1979 Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the pubiic interest.

/s/ Marvin H. Smith
Senior ~~Chief~~ Judge

Date: January 4 , 1980.

79-1590

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IN THE

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OCTOBER TERM, 1979

JOSEPH NOLAN, the younger

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vs.

STATE OF MARYLAND

Respondent

APPENDIX

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Richard M. Karceski
1504 Arlington Fed. Bldg.
Baltimore, MD 21201

Attorneys for the Petitioner

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Richard M. Karceski
1504 Arlington Fed. Bldg.
Baltimore, MD 21201

Attorneys for the Petitioner

UNREPORTED

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2. Did the trial court err in admitting an unsigned letter which was either hearsay testimony or unsupported by a sufficient foundation connecting it to Appellant?

3. Did the trial court abuse its discretion in qualifying a six year old witness who had no conception that it is necessary to tell the truth in court and did not believe it is wrong to tell a lie?

4. Did the trial court err in denying the motion to withdraw brought by Michael Kaplan at the request of his client, Helen Nolan?"

Finding no error, we shall affirm.

The factual background leading to appellant's convictions will be stated briefly, with further facts supplied as necessary to discuss the various issues. On May 1, 1978, Mrs. Godfray received a telephone call from an individual, whom he identified as appellant, in which she was advised that the caller had her son, Tony Howe, and that she would have to pay $300.00 to get him back. This call prompted Mrs. Godfrey to call the police, who

responded to her home where she told them where appellant lived. At appellant's home the police found appellant Michael Evans, and Calvin Washington. They were asked if they had seen Tony Howe, to which there was a negative response. Thereafter, the police, the appellant, and his two companions returned to Mrs. Godfrey's home where Tony's younger sister, Angilene, told the officers that she had seen Tony with appellant and Evans earlier in the day. Based on this information, appellant and Evans were taken into custody and transported to Northwestern District where appellant was questioned, with his parents in attendanse at all times. During this questioning appellant ultimately stated, "I will show you where he is." Appellant then directed the police to the city dump on Cold Spring Lane and to a quarry located in the dump. Appellant showed the police where he had last seen Tony on the rocks in the quarry. Appellant was then taken to the Homicide Office, while other officers began a search of the quarry for Tony; this search was subsequently suspended due to darkness. Meanwhile a search, upon a warrant, was made of the Evans home and a tennis shoe and shirt, stipulated as belonging to Tony, were found. Early the next morning the search of the quarry was resumed which ultimately resulted in the discovery of the body of Tony Howe. Appellant, testifying in his own behalf at trial, stated that although he was present when Tony was pushed into the quarry, he did not participate in the act. He also denied making the phone call to Mrs. Godfrey.

A. Did the trial court err in denying a motion to withdraw filed by appellant's attorney?

Appellant's attorney, Michael Kaplan,

was retained to represent him by Nolan's mother since appellant was only fourteen years old. About six weeks before trial the attorney filed a motion to withdraw as appellant's counsel, at the request of appellant's mother. A hearing was held during which it was developed that the reason for the mother's request was that she felt there had been a breakdown in communications between her son and Mr. Kaplan. It became apparent however, that this breakdown, if there was such in existence, was due solely to appellant's feeling that Mr. Kaplan did not appear at the jail to see appellant at a time when the attorney said he would be there. Appellant advised the court that he had no other problems with the attorney. The State did not oppose the motion but made it clear that it wanted the trial to go forward on the assigned date. Mr. Kaplan advised the court he had no difficulties with continuing to represent appellant. The trial court denied the motion.

In Wright v. State, 32 Md. App. 60, 359 A.2d 1 (1976), we stated:

"It is fundamental that in the absence of a specific and substantial reason for substitution of counsel, the question of whether to permit a change of counsel is a matter committed to the sound discretion of the trial court." [Citations omitted.]

Id. at 62. In our view, no abuse of discretion can be found in the denial of the motion by the trial court. There was no complaint by appellant or his mother that Mr. Kaplan was not representing him, nor could not represent him, adequately. Appellant's only complaint was that Mr. Kaplan did not keep some appointments or arrived late. We believe the proper administration of justice

should not be impaired for frivolous reasons. While it appears the trial of the case may not have been delayed for an undue length of time, this, of course, is conjecture. Under the circumstances, we do not believe the trial judge abused his discretion.

B. Did the trial court err in admitting hearsay testimony of a co-conspirator in absence of sufficient independent evidence of a conspiracy?

During its case-in-chief, the State called Calvin Washington as a witness through whom it was shown that he visited Michael Evans on May 1, 1978 and, over appellant's objection, he related a conversation he had with Evans in which he said Evans told him, "Me and Junie killed Sharon's little brother." (Junie was appellant's nickname.) Washington was also shown a tennis shoe and shirt in Evans' backyard and was told they belonged to the little boy and that they were going to give them to the boy's mother for money. Appellant argues, and the State concurs, that this constituted hearsay; they part company at this point, however. The State argues that since it had established the existence of a conspiracy by independent evidence, these statements fell within the co-conspirator exception to the hearsay rule. In Mason, Taylor and Taylor v. State, 18 Md. App. 130, 305 A.2d 492 (1973), cert. denied, 269 Md. 763, 767, cert. denied, 416 U.S. 907, we said:

". . . the rule is that when the State seeks to use statements against a co-conspirator made by another co-conspirator to a third party, it must first demonstrate, through evidence aliunde, the existence of a conspiracy, . . . "
Id. at 136-37. Our independent review

persuades us that the State had met its burden of establishing the existence of a conspiracy. There was testimony earlier in the trial that on the day before the incident appellant and Evans told Tony's sister they were going to kidnap a member of her family and that on May 1 appellant and Evans asked the sister for the whereabouts of Tony. The sister also testified that near dinnertime on May 1 appellant called her on the telephone and admitted he and Evans had killed Tony. Furthermore, Mrs. Godfrey had testified that appellant called on May 1 and demanded $300.00 for Tony's return. Finally, Tony's clothes were discovered at Evans' home. We believe this evidence sufficient to independently establish a conspiracy to murder, kidnap, and extort on the part of appellant and Evans.

Appellant argues alternatively that the conspiracy had terminated (assuming it existed) since Evans made the statement to Washington after Tony was kidnapped and killed and thus the statement was inadmissible. We disagree with appellant since the extortion was ongoing; therefore, it is clear the entire conspiracy had not terminated when the statement was made. In Greenwald v. State, 221 Md. 245, 157 A.2d 119 (1960), appeal dismissed, 363 U.S. 721, the Court of Appeals stated:

"... if the conspiracy contemplated the continuous cooperation of the conspirators in the perpetration of a series of offenses ... it was in effect 'a partnership in criminal purposes,' and continued until the time of its abandonment or the final accomplishment of its purposes."

Id. at 250-251. We find no error here.

C. Did the trial court err in admitting into evidence an unsigned letter?

In the course of the cross examination of appellant he was shown an unsigned letter,[1] which was addressed to Sharon, the victim's sister. The State's Attorney attempted to demonstrate that appellant had authored the letter, but he denied it. Although timely objection was made, the witness was allowed to read the letter to the jury and it was subsequently offered and admitted into evidence. Appellant argues that since the letter was unauthenticated and unsigned, it was inadmissible since it amounted to unsworn hearsay testimony, citing Parker v. State, 12 Md. App. 611, 280 A.2d 29 (1971) and DiPietro v. State, 31 Md. App. 392, 356 A.2d 599 (1976). The State contends the letter was authenticated by its contents, i.e., that the letter must have been written by appellant since it contained information that only appellant would know, citing McCormick on Evidence, 2nd Ed., Sec. 225, p.552 (1972). We need not address the question of whether an unsigned writing may be authenticated by the alternate route of authentication of contents because we believe the admission of the letter to be merely cumulative in any event. Cf. Dorsey v. State, 276 Md. 638, 652-53, 350 A.2d 665 (1976). A reading of the letter demonstrates

1. "Dear Sharon, how are you doing? Fine I hope. This is a good letter. I called your cousin's house looking for you. Right now I am not going to put my name but take a guess who it is. You should know. Well, I am doing fine. Tell your stepfather I said fuck him. My friend Jun want you back, so write him at this address. 401 E. Eager Street, Baltimore Maryland 21202. Name, sorry. Can't give you the name but take a guess. Section G, Bed 52. It used to be your boyfriend's"

that the author was expressing animosity to Sharon's stepfather, a fact which easily could have been gleaned from previous testimony that the stepfather had forbidden Sharon from seeing appellant anymore. Further, the letter indicated that "Jun" wanted her back, certainly not evidence indicating complicity in the pending charges. In our view, even if the admission of the letter was error - a point we do not decide - it was harmless.

D. Did the trial court err in qualifying a six year old witness?

Angeline Howe, six years old and a sister of the victim, was offered as a witness by the State. Prior to being sworn, the State asked her a series of questions, obviously designed to determine whether the witness knew the difference between telling a lie and telling the truth, as well as knowing the consequences of telling a lie. Appellant contends that because of certain responses made by the witness she exhibited a questionable comprehension of the need for testifying truthfully. Appellant concedes that the capacity of children to testify is within the sound discretion of the trial court. See Reckard v. State, 2 Md. App. 312, 234 A.2d 630 (1967), cert. denied, 248 Md. 734 (1968). Nevertheless, appellant contends this discretion was abused because there was no showing the witness demonstrated that she appreciated the obligation of an oath; indeed, she was not even asked. We have reviewed the record and while the witness did not know what would happen if she told a lie in court, she clearly exhibited an understanding of the difference between a lie and the truth, and the consequences of telling a lie, i.e., she would be punished. Furthermore, she promised to tell the truth in her testimony. It is evident

that the trial judge found, and we cannot say he was wrong, that the witness understood the difference between telling the truth and telling a lie. We find no abise of discretion in the judge's finding that she was competent to testify. See Williams v. State, 11 Md. App. 350, 274 A.2d 403 (1971).

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

MANDATE

COURT OF SPECIAL APPEALS OF MARYLAND

No. 171, September Term, 1979

JOSEPH NOLAN, THE YOUNGER * October 31, 1979
* Per Curiam filed.
VS. * Judgments affirmed
* Costs to be paid
STATE OF MARYLAND * by the Appellant.
*
*November 30, 1979.
*
*Mandate issued.
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STATEMENT OF COSTS:

In Criminal Court of Baltimore

Record	30.00
Stenographer's Costs	1,374.00

In Court of Special Appeals:

Filing Record on Appeal	30.00
Printing Brief for Appellant	NOT SUPPLIED
Reply Brief	
Portion of Record Extract - Appellant	
Printing Brief for Cross-Appellee	
Printing Brief for Appellee . . .	40.00
Portion of Record Extract - Appellee	
Printing Brief for Cross-Appellant	

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this thirtieth day of November, A.D. 1979

/S/ Howard E. Friedman
Clerk of the Court of
Special Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

JOSEPH NOLAN, the Younger *
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v. *
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STATE OF MARYLAND *
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IN THE
COURT OF APPEALS
OF MARYLAND

Petition Docket No. 374

September Term 1979

(no. 171, Sept. Term, 1979 Court of Special Appeals)

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Marvin H. Smith
Senior Judge

Date: January 4, 1980

CERTIFICATE OF MAILING

I hereby certify that on this 8th day of April, 1980 three copies of the aforegoing Petition for Writ of Certiorari and Appendix to the Petition were mailed to the Office of the Attorney General, Eighth Floor, U.S. Court House, 101 W. Lombard Street, Baltimore, Maryland 21201.

Harold I. Glaser
HAROLD I. GLASER